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October 29, 2001

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**VIA HAND DELIVERY**

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Re: Docket No.: 000121-TP

Dear Ms. Bayo:

On behalf of Z-Tel Communications, Inc., AT&T Communications of the Southern States, Inc., MCI WorldCom Communications, Inc., and DIECA Communications Company d/b/a Covad Communications Company, hereinafter referred to as the Joint ALECs', enclosed please the original plus 15 copies of the Joint Motion for Clarification Or, In the Alternative, Suggestion for Recommendation on the Commission's Own Motion, as well as the original and 15 copies of the Request for Oral Argument.

Please return a date stamped copy to me. Thank you for your assistance in this matter.

Yours truly,

Joseph A. McGlothlin

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**BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION**

In re: Investigation into the Establishment of  
Operations Support Systems Permanent  
Performance Measures for Incumbent Local  
Exchange Telecommunications Companies

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Docket No.: 000121-TP

Filed: October 29, 2001

**JOINT MOTION FOR CLARIFICATION OR, IN THE ALTERNATIVE,  
SUGGESTION FOR RECONSIDERATION ON  
THE COMMISSION'S OWN MOTION**

Z-Tel Communications, Inc. (Z-Tel), AT&T Communications of the Southern States, Inc. (AT&T), MCI WorldCom Communications, Inc., (WorldCom), and DIECA Communications Company d/b/a Covad Communications Company (Covad), hereinafter referred to as the Joint ALECs, respectfully request the Commission to clarify Order No. PSC-01-1819-FOF-TP. In the alternative, Joint ALECs request the Commission to reconsider the Order on its own motion. In support, Joint ALECs show the following:

**MOTION FOR CLARIFICATION**

In this docket, BellSouth proposed a performance plan under which the size of any penalty would be a function of the degree of severity of BellSouth's poor performance and the number of transactions in which BellSouth's performance fell short of the standards established by the plan. The BellSouth plan is a "transactions-based" plan.

The Joint ALECs proffered a different plan under which the amount of the penalty would be a function of the degree of severity of BellSouth's poor performance, but not the numbers of ALEC transactions. The Joint ALEC plan is a "measure-based" plan.

Importantly, under the proposals of both BellSouth and the ALECs, the amount of the penalty would increase with an increase in the severity of BellSouth's poor performance (i.e., the degree to

which BellSouth's service to ALECs diverged from its service to its own customers). Staff witness Paul Stallcup recognized this fact in his testimony, noting:

Both remedy methods contain two additional features that allow the basic penalty amounts to be increased. The first feature increases the penalty amounts in response to increases in the degree, or severity of the non-compliance. (TR-60).

Furthermore, in his own testimony, Staff witness Paul Stallcup sponsored a "strawman" proposal under which the amount of the penalty would increase with an increase in the severity of BellSouth's deficient performance.

During his deposition, which was admitted into evidence as Exhibit 12, Staff requested Z-Tel witness Dr. George Ford to provide a late-filed exhibit consisting of a "hybrid" performance plan (i.e., a plan that selects and incorporates the better attributes of BellSouth's transactions-based plan, the ALEC's measure-based plan, and the "strawman" plans). Under Dr. Ford's proposed hybrid, the amount of the penalty a) would increase with an increase in the severity of BellSouth's deficient performance; b) would depend on the number of ALEC transactions; and c) would vary by the type of measure.

In short, *without exception*, every performance plan sponsored in this docket featured a penalty mechanism under which the amount of the penalty would increase with an increase in the severity of the identified violation. The Joint ALECs believe the reason is obvious. We see evidence of this in everyday life. If the penalty for exceeding the speed limit by 5 miles an hour were \$100 dollars and the penalty for exceeding the speed limit by 30 miles an hour were also \$100, then speeders would have an incentive to speed more -- or violate the law to a greater degree. Obviously, traveling 30 miles over the speed limit poses a greater threat to public safety, so higher penalties are imposed to deter the more damaging behavior.

The same reason explains why, in every known enforcement scheme, the penalty for an offense increases with the severity of the offense. Here, the purpose of a penalty mechanism is to overcome BellSouth's incentive to discriminate against its competitors (or its lack of incentive to remedy performance problems). To incent BellSouth to provide parity service, penalties must increase with the severity of the violation. If they do not, BellSouth's incentive to perform at parity or closer to parity is entirely diminished. If the penalty is set at a low amount that remains fixed, without regard to increases in the severity of the poor performance, the plan, instead of acting as a deterrent, will instead perversely provide BellSouth with an incentive to discriminate as severely as possible. Instead of acting as a deterrent, the plan would invite and encourage discriminatory behavior.

In Order No. PSC-01-1819-FOF-TP, the Commission compared the features of the plans proposed by BellSouth and Joint ALECs. The Commission discussed, among other things, perceived shortcomings in both methodologies. At page 162-164, the Commission stated:

Because the evidence demonstrates that there are fundamental flaws in both the BellSouth and ALEC Coalition remedy plans, we have no choice but to require a remedy plan which incorporates the better features of the two. First, we find that the remedy plan must, at least initially, be measure-based given what we believe to be serious issues with BellSouth's parity gap and affected volume calculations. Over time, it may be possible to evolve to a transaction-based system, with a minimum payment, an idea mentioned by Z-Tel witness Ford. If the issues with BellSouth's parity gap and affected volume calculations can be solved through the periodic review process, we believe that transaction-based remedies, with a minimum payment provision, would be preferable in concept. For now, however, we see no choice but to require that a measure-based remedy plan be adopted.

.....

Based on the above considerations, BellSouth shall develop a remedy plan which includes certain features. Remedies shall be measure-based, rather than transaction-based, and shall vary by type of measure and duration for Tier 1, and type of measure

for Tier 2. The relative relationships between the various measure-based remedy payments shall be consistent with the relative relationships between the various BellSouth proposed, transaction-based remedy payments. Tier 1 remedies shall be set such that the average Month 1 remedy approximates the \$2,500 minimum payment recommended by the ALEC Coalition.

At page 141 of Order No. PSC-01-1819-FOF-TP, the Commission acknowledged that the provisions of the order would require interpretation. The Order established a post-order procedure intended to enable Staff and parties to work together to fashion a performance plan that would conform to the Commissioners' intent. During the first meeting held on October 15, 2001 to discuss the matter, Joint ALECs learned that Staff and BellSouth, on one hand, and Joint ALECs, on the other, had been interpreting Order No. PSC-01-1819-FOF-TP far differently. Joint ALECs interpreted the Order to require BellSouth to submit a measure-based plan that would include a penalty mechanism that would draw from the features of the BellSouth plan but would incorporate a measure-based "severity" feature, since all proposed plans had such a feature. During the meeting of October 15, 2001, Joint ALECs learned that Staff and BellSouth believe the Commission intended BellSouth to prepare a plan under which the *penalty established for each measure would remain a fixed amount, regardless of the severity of BellSouth's deficient performance.*

During the meeting, Staff informed Joint ALECs that Staff intended, in its memorandum of August 2, 2001, to recommend that the Commission prescribe a performance plan containing no "severity" component. Prior to October 15, Joint ALECs did not read Staff's recommendation to require this result. Having since reviewed the written recommendation and the audio recording of the dialogue among Commissioners and Staff during the decision conference of August 14, 2001, Joint ALECs believe a failure of communication between Staff and Commissioners also may well have occurred, and that the intent of the Commission differed from Staff's. This belief is based on the

following:

1. At no point in the Staff Memorandum of August 2, 2001; the agenda conference of August 14, 2001; or in Order No. PSC-01-1819-FOF-TP, did the Staff or Commission state that BellSouth is to exclude “severity” as a component of the penalty calculation in the plan it is to submit. (The fact that the Commission concluded that it could not approve the BellSouth “parity gap” methodology for measuring severity and would therefore direct BellSouth to implement a measure-based plan “for now” says nothing about eliminating the severity feature, as the severity concept is a fundamental component of a measure-based plan and all measure-based plans proposed by the parties included a severity feature. Nor does the average \$2500 penalty prescribed by the order preclude a severity component, as the ALECs’ proposal of minimum and maximum penalties per measure could account for severity while conforming to this requirement.

2. In the absence of a calculation methodology that ties the amount of the penalty to the severity of the offense, and given the average \$2500 penalty prescribed by Order No. PSC-01-1819-FOF-TP, BellSouth could pay a low “flat” amount and discriminate as severely as it pleases. To illustrate: If the Commission approves penalty levels contained in BellSouth’s post-order submission, and BellSouth subsequently were to refuse to provide any orders for a given ALEC over an entire year, the total penalty paid by BellSouth would be \$34,050 ( The ALECs’ proposed plan would levy a \$6.4 million penalty for the same performance deficiency). In other words, eliminating the relationship of “severity” to the penalty calculation would effectively eviscerate the plan. Yet, the extreme ramifications of eliminating the relationship between severity and the amount of the penalty were not mentioned or discussed by the Commissioners during their deliberations.

3. There is no evidence in the record to support a plan that computes penalty levels

without considering the severity of the poor performance.

4. One feature of the plan is a cap on BellSouth's exposure to penalty payments. The Commission adopted an annual cap equal to 39% of BellSouth's operating revenues - the same cap that the parties associated with a penalty plan that would impose far higher penalties on more severe violations of the standards of the plan. If the intent had been to reduce the exposure as dramatically as a "single penalty amount" concept -- hereby effectively reducing BellSouth's exposure to pennies on the dollar when compared to the parties' proposals -- there would have been no reason to incorporate a cap of the same magnitude.

For these reasons, Joint ALECs believe it was not the Commission's intent to sever the relationship between the severity of a violation and the amount of the corresponding penalty when it voted to require BellSouth to prepare a measure-based plan. Rather, Joint ALECs believe the Commission's intent was to adopt a measure-based plan that incorporates a measure-based severity feature pending further exploration of BellSouth's transaction-based approach during the review cycle established by Order No. PSC-01-1819-FOF-TP. The Joint ALECs respectfully request the Commission to clarify that this was its intent, and direct BellSouth to proceed to develop its performance plan accordingly.

**ALTERNATIVE SUGGESTION FOR RECONSIDERATION  
ON THE COMMISSION'S OWN MOTION**

In the event Joint ALECs are mistaken in their belief that the Commission's intent was to incorporate a severity component in the performance incentive plan, Joint ALECs respectfully suggest that the Commission should, on its own motion, reconsider its decision to remove the severity component. The basis for this suggestion is that the record supports the use of a measures-based

severity feature, and to conclude otherwise would be to commit an error that will -- unless and until a severity component is added in the future -- literally doom the Commission's effort to implement an effective performance plan.<sup>1</sup>

In Order No. PSC-01-1819-FOF-TP the Commission recognized that the concept of parity, or non-discrimination, by definition involves the absence of any difference in means. (At 148). The difference in means is the fundamental measurement of the extent of discrimination; as the degree of disparity of treatment increases, the difference in means increases. As Z-Tel witness George Ford testified, the severity component of the Joint ALECs' measure-based plan is a function of a measurement of the difference between the mean of BellSouth's performance for its own customers and the mean of BellSouth's performance for ALECs. (TR-1188 ).

Apparently, the view that the Joint ALECs' proposed penalty mechanism is flawed stems from the criticism of BellSouth witness Dr. William Taylor. Dr. Taylor's premise was that the ALECs' approach confuses statistical certainty with severity. (TR-1251; Order, at p 162). Dr. Taylor was mistaken. The Joint ALEC plan does not compute severity with a statistical decision rule. Any conclusion that the ALEC penalty mechanism uses the same statistical yardstick to detect discrimination and measure severity is based on a misapprehension of evidence stemming from Dr. Taylor's palpably erroneous statement. In his deposition, Dr. Ford demonstrated conclusively that ALECs' methodology does not use the same statistical tool for both purposes - *but BellSouth's does*:

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<sup>1</sup>Joint ALECs learned of the difference in interpretation described herein after the time for filing a motion for reconsideration had passed. However, because BellSouth's motion for reconsideration is pending, Order No. PSC-01-1819-FOF-TP has not become final and the Commission is free to reconsider it on the Commission's own motion. (See Order No. PSC-01-2051-FOF-TP, issued in Docket No. 990649 on October 18, 2001).

The other area, I think, is the measure of disparity that the plans use. The BellSouth plan uses a parity gap calculation, which is the difference between the truncated z and the balancing z divided by four, which computes the volume proportion, and then is multiplied by sample size. As Doctor Taylor makes clear in his testimony, the difference between two scores doesn't tell you a whole lot. Because the z score is going to be a complex function of sample sizes of standard deviations of means. And subtracting one from the other does not remedy that problem. It makes it nastier than it is if you just looked at the z score itself. By taking the ratio of the two z scores, however, the sample sizes cancel out. (Exhibit 12, at Page 8).

.....

By Mr. Fudge:

Q: Doctor Ford, do you agree with Doctor Taylor that the same statistical decision rule cannot be used to detect noncompliance and also be used to determine the severity of noncompliance for purposes of setting remedies?

A: I think it depends somewhat on how you interpret that. I think that a subtraction of z scores [advocated by BellSouth] is not a reasonable measure of disparity, certainly not an accurate one. But the ratio of the z scores [advocated by Joint ALECs] becomes something other than the statistical test. It simply becomes the means difference divided by one-half delta times the standard deviation. That is a different -- you could specify that without doing statistics at all. You could specify that disparity level. So I think that if the results of the statistical test are used in a way that eliminate the problems of using a statistical method to determine penalty, then there is no problem with that, because you could just as easily not use statistics at all if the statistical elements of the plan go away.

But if you just take a first difference of the z scores then that, you know, that has all the problems inherent in using statistic sample sizes and all of that mess. (Exhibit 12, at page 53-54). (emphasis supplied).

Severity as measured by the Joint ALEC plan is nothing more than the difference in service levels divided by one-half delta, multiplied by the standard deviation of BellSouth's service. This calculation is not a statistical decision rule, as sample size is irrelevant to its value. As the difference in mean performance grows larger, the ALEC severity index gets larger. As the difference in mean performance gets smaller, the ALEC severity index gets smaller. (On the other hand, the BellSouth

plan computes severity based on the subtraction of z-scores -- which are statistical decision rules -- and does not have this property).

Nevertheless, it is not necessary for the Commission to accept the ALECs' methodology in its entirety to reconsider its order and require BellSouth to incorporate the concept of severity. Without conceding any need to modify the ALECs' plan based on Dr. Taylor's ill-founded criticism, Joint ALECs point out that even BellSouth's witness described an adjustment that would meet his objections and would retain the "severity component." In response to questions from Staff, Dr. Taylor agreed that the measure-based proposal submitted by Joint ALECs could be modified to incorporate the features of BellSouth plan that he preferred. (Exhibit 7, at pages 32-33). Significantly, even under such a hybrid approach, Dr. Taylor contemplated that the quadratic equations of the ALECs' penalty plan, when "tuned" to satisfy his concerns regarding the payment levels applicable to each type of metric, would "float upward" to reflect the relative severity of the violation. (Exhibit 7, at page 34). He specifically acknowledged that, as adjusted, the ALECs' proposed mechanism would avoid his earlier objection, which was that the ALECs' plan (in his view) used the same statistical decision rule to detect disparity and severity. (Exhibit 7, at pages 33-34). Dr. Taylor expressed his opinion clearly during the deposition:

Staff:

Q: I'm now going to ask you a hypothetical about a possible compromised (sic) plan between BellSouth's enforcement plan and the ALEC plan.

A: Okay.

Q: Suppose that the enforcement measures are those proposed by BellSouth with compliance determined by the truncated z test statistic in which individual cell level compliance is aggregated up to the submeasure level.

Suppose that the measure-based penalty mechanism proposed by the ALEC coalition is used to calculate any penalty payments resulting from noncompliance service at the submeasured level. Under this plan, do you see any theoretical inconsistencies?

A: Any theoretical inconsistency? Now, in theory, that makes - it's possible to construct a plan which has that effect, if by the ALEC measure-based penalty mean the quadratic formulas that they use, if you were to adjust the level of the penalties using something like the BellSouth numbers for different measures to reflect BellSouth's or somebody's judgment about what measures are important and what measures aren't, then I think you've probably got something that would work.

Is severity that the Joint ALECs are proposing. I mean, it's - but a lot of this stuff is and, you know, the function is increasing in - well, it's increasing in the difference between the z statistic and critical value. So, if you can tie it back, as the BellSouth plan does, to measure specific penalty levels; so tune the quadratic so that the maximum payment or the minimum payment or something like that reflects those differences, then I think you might have - if not the best of both, you'd have something which has the structure of both in a consistent way.

.....

I mean, for the whole range of that quadratic make it go up or down to reflect the levels of payment that BellSouth has told you are, for particular measures, important as opposed to others. (Exhibit 7, at page 32-34).

Both Dr. Taylor and Z-Tel's Dr. Ford supported plans that would increase penalties with increases in severity. Both Dr. Taylor and Dr. Ford testified that the severity feature could be incorporated in hybrid versions of the BellSouth and ALEC approaches. In a late-filed exhibit to his deposition, Dr. Ford illustrated one such hybrid approach, and nothing limits BellSouth from using it or proposing another now. (See Late-filed exhibits 2 and 3 to Exhibit 12). There literally are an infinite number of indicia of severity that could be used in a measure or transactions-based performance plan; all that is required of a valid index is that it (always) grow larger as the disparity in service quality levels between the ALEC and BellSouth grows larger.

There is no valid evidentiary basis on which to omit this “severity component” of the measures-based plan that the Commission ordered BellSouth to implement. The exclusion of such a relationship in the calculation of the penalty would have a ruinous impact on the efficiency of any performance plan. The Commission should reconsider its decision and order BellSouth to incorporate this feature.

WHEREFORE, Z-Tel Communications, Inc, AT&T Communications of the Southern States, Inc., MCI WorldCom Communications, Inc., and DIECA Communications Company d/b/a Covad Communications Company request the Commission to clarify its original intent to prescribe a performance plan that incorporates a penalty mechanism under which the amount of the penalty varies with the severity of measured discrimination.

Alternatively, the Joint ALECs request the Commission to reconsider Order No. PSC-01-1819-FOF-TP on its own motion and rule that BellSouth must incorporate such a “severity” mechanism in its performance plan.

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## CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of Z-Tel Communications, Inc., AT&T Communications of the Southern States, Inc., MCI WorldCom Communications, Inc., and DIECA Communications Company d/b/a Covad Communications Company, hereafter the Joint ALECs, their Joint Motion for Clarification or, in the Alternative, Suggestion for Reconsideration on the Commission's own Motion has been furnished by hand delivery(\*) or U.S. mail on this 29<sup>th</sup> day of October, 2001 to:

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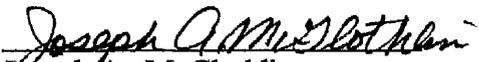
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**BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION**

In re: Investigation into the Establishment of  
Operations Support Systems Permanent  
Performance Measures for Incumbent Local  
Exchange Telecommunications Companies

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Docket No.: 000121-TP

Filed: October 29, 2001

**JOINT ALECS' REQUEST FOR ORAL ARGUMENT**

Pursuant to Rule 25-22.058, Florida Administrative Code, Z-Tel Communications, Inc. (Z-Tel), AT&T Communications of the Southern States, Inc. (AT&T), MCI WorldCom Communications, Inc., (WorldCom), and DIECA Communications Company d/b/a Covad Communications Company (Covad), hereinafter referred to as the Joint ALECs, respectfully request oral argument on their Joint Motion for Clarification Or, in the Alternative, Suggestion for Reconsideration on The Commission's Own Motion ("Joint Motion") and, in support, state:

1. In the Joint Motion, the Joint ALECs request the Commission to clarify Order No. PSC-01-1819-FOF-TP by articulating its intent to require BellSouth to submit a performance plan under which a penalty for poor performance increases with the increased severity of the poor performance. Alternatively, Joint ALECs request the Commission to reconsider, on its own motion, the decision to exclude the concept of severity from the plan.

2. The evidence in this proceeding is highly technical in nature. Oral argument would assist the Commission in understanding and analyzing the parties' respective positions.

3. In the Joint Motion, the Joint ALECs assert that a "severity feature" is essential to the objective of a meaningful performance plan. A well designed performance plan, in turn, is critically needed to overcome BellSouth's incentive to discriminate against its competitors. An issue of this magnitude deserves the Commission's fullest consideration -- including oral argument.

4. During the agenda conference of August 14, 2001, Commissioner Deason encouraged parties to work out details of the plan, but acknowledged it would be appropriate for parties to bring disputes involving major policy considerations back to the Commission. The Joint ALECs respectfully submit that the subject of the inclusion or exclusion of a consideration of “severity” in the penalty calculation presents an issue of major dimensions that warrants the Commission’s attention. Further, the severity concept is so fundamental to an effective performance plan that the Commission should address it at the outset, rather than during a subsequent “review” of the plan. Oral argument would better equip the Commission to review the parties’ contentions in this regard.

WHEREFORE, the Joint ALECs respectfully request permission to present oral argument in support of the Joint Motion.

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## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a true and correct copy of Z-Tel Communications, Inc., AT&T Communications of the Southern States, Inc., MCI WorldCom Communications, Inc., and DIECA Communications Company d/b/a Covad Communications Company Joint ALECs' Request for Oral Argument has been furnished by hand delivery(\*) or U.S. mail on this 29<sup>th</sup> day of October, 2001 to:

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